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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOSEPH SPENCER TRACY, as Trustee, etc.,

Plaintiff and Appellant,

v.

LOUISE TREADWELL TRACY,

Defendant and Respondent.

B203084

(c/w B205335)

(Los Angeles County

Super. Ct. No. BC350333)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Andria K. Richey, Judge and Joseph R. Kalin, Judge. Affirmed in part and reversed in part and remanded with directions.

Law Offices of Steven W. Kerekes and Steven W. Kerekes for Plaintiff and Appellant.

Miller Barondess, Louis R. Miller, Brian A. Procel and Ryan P. Connolly for Defendant and Respondent.

* * * * *

Plaintiff and appellant Joseph Spencer Tracy, as trustee of the John Ten-Broeck Tracy Family Trust, appeals from a judgment and orders entered following a jury trial on his claims for breach of fiduciary duty against defendant and respondent Louise Treadwell Tracy, also known as Susie Tracy (Susie).¹ Appellant sought recovery for Susie's receipt of a \$400,000 transfer from John Tracy (John) and her retention of several items of personal property that appellant claimed should have been divided between John and Susie. The jury found that Susie breached her fiduciary duty to appellant in all respects, but awarded only \$2 in damages. Thereafter, the trial court declined to impose a constructive trust over any personal property, denied appellant's motions for judgment notwithstanding the verdict and for a new trial, and declined to award appellant his costs, granting Susie's motion to tax costs.

We affirm in part and reverse in part. We find no basis to disturb the jury's verdict, as the trial court properly exercised its discretion in excluding evidence of John's diaries and substantial evidence supported the damages award. The trial court also properly denied appellant's motion for a new trial, as the damages award was neither inadequate as a matter of law nor the product of jury misconduct. We find no substantial evidence, however, to support the trial court's declining to impose a constructive trust over specified items of personal property which Susie conceded were subject to John's one-half interest. Because the trial court misread the judgment as precluding an award of costs to appellant, we must also reverse the denial of costs to him.

FACTUAL AND PROCEDURAL BACKGROUND

The Tracy Family's Financial Transactions.

John Tracy (John) and Susie are the children of Spencer Tracy and Louise Treadwell (Louise). John was born deaf and with Usher syndrome, a disease that

¹ Because many individuals involved in this matter share the same last name, we refer to them by first names to avoid confusion and not out of disrespect. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

involves macular degeneration of the retina. He contracted polio when he was a boy, which permanently weakened his leg. Despite these disabilities, he engaged in certain sports and was able to work at Disney Studios in the 1960's. He married and had a son, appellant, and later divorced. Appellant's mother received custody of him, and John moved back in with Louise after the divorce. In 1982, Louise was placed in a convalescent hospital and John moved into a retirement home.

Beginning in 1976, Robert Plourde, Sr. (Plourde, Sr.) served as the Tracy family accountant. He performed work for some of the family trusts and also worked for John and Susie individually. Later, in the early 1990's, Robert Plourde, Jr. (Plourde, Jr.) began performing accounting work for John and Susie. Plourde, Jr., characterized John as always being generous with family members.

Appellant served in the military between 1974 and 1978. He rejoined the military in 1988 and was discharged in 1995; during that time he married and had children. Occasionally during this time, appellant would receive loans from John for particular purposes, such as to attend school, start a small business and move back to California. While appellant was in the military, his wife Cyndi helped care for Louise. Ultimately, when appellant left the military the second time, he, John and Plourde, Sr., agreed that John would provide a stipend to appellant in the amount of \$2,500 per month. This amount helped to cover appellant's rent and school tuition.

About five years later, when John's health and ability to care for himself had deteriorated significantly, appellant proposed that John purchase a home in which John and appellant's family would live together. Although Susie and Plourde, Sr., were opposed to the plan, John liked the idea and gave appellant and his family \$300,000 to purchase a house. Plourde, Jr., assisted John with the transaction. Appellant purchased a home in 2000; John moved in one year later after appellant outfitted the home to make it habitable for John. Though appellant and his wife initially cared for John by themselves, they later hired a housekeeper—paid for by John—to assist him.

For approximately 15 years, Susie had helped to manage John's care and finances. Over Susie's objection, the court appointed appellant as John's conservator in 2002.

Simultaneously, the court appointed appellant as the trustee of John's trust and approved a monthly management fee of \$1,800 as well as a \$3,000 monthly fee to cover John's room and board. At that point, appellant found several copies of John's will; one copy containing Susie's handwriting provided that appellant would receive \$10,000 upon John's death, while she and her friend Susan Moon (Moon) would receive the balance of his estate. John became upset when appellant told him about the proposed distribution. A court-appointed attorney who consulted with John drafted a new will which reflected John's wishes. The new will left 90 percent of John's assets to appellant and his family, with nothing to Susie.

After this incident, appellant obtained a copy of Louise's will to ascertain her intentions. He learned that Susie had been appointed as the executrix of Louise's estate in 1984 and that she was required to disburse one-half of Louise's personal property to John. Appellant wrote to Susie in August 2003, asking her for a copy of any documents reflecting an inventory and/or distribution of the items. Susie responded in October 2003, attaching a receipt signed by John indicating that he had received one-half of the assets from Louise's estate. When appellant questioned John about the receipt, he said that he had received one-half of the monetary assets but none of the personal property. Susie later stated that her 2003 response was intended to show that John had signed a receipt, but not that he had received any of the personal property. She recalled that she and John each signed receipts in order to close the estate. John explained that he had no room for the items at his retirement home and he believed that Susie was storing them for him. Though Susie did not believe she had such an understanding with her brother "in those words," she likewise recalled that she received all items of personal property from Louise's estate and did not distribute anything to John.

With appellant's help, John prepared a list of approximately 24 specific items of personal property that he recalled from Louise's estate. With the exception of John's polo mallet, tennis racquet and cameras, Susie confirmed that she received and continued to possess the items identified on the list as part of Louise's estate. According to

appellant, the list represented less than one-half of the personal property items in the estate.

In going through John's papers, appellant also discovered a series of transactions between John and Susie. In 1984, John had loaned Susie and Moon \$400,000 for the purchase of a home. Plourde, Sr., was involved in and had recommended the transaction. Susie and Moon made payments on the loan, with interest, from 1985 to 1988.

Then in 1988, Susie and Moon received another \$400,000, comprised of one check to Susie in the amount of \$320,000 and one to Moon in the amount of \$80,000. Susie understood that those checks were gifts. Plourde, Sr., similarly recalled that John had wanted to make a gift to Susie, given that he had sold a large block of stock that generated a significant sum of money and the gift could help reduce his estate tax. Accordingly, Plourde, Sr., and Plourde, Jr., prepared a gift tax return reflecting the sums given to Susie and Moon. At some point, however, John explained to appellant that he believed all transactions were loans.

Appellant confronted Susie in 2005. She acknowledged receiving the first \$400,000 as a loan, but said she stopped making payments before the loan was paid off because Plourde, Sr., told her John could afford for her to stop. Though she initially denied any knowledge of the 1988 transfers, Susie later indicated that the second \$400,000 amount was set up by Plourde, Sr., as a gift to repay the initial \$400,000 loan. Plourde, Sr., also recalled that Susie and Moon stopped making payments on the initial \$400,000 loan because they paid it off with the later gift. Subsequently, Susie showed appellant a copy of a check dated March 18, 1988 from Susie to John in the amount of \$318,695, which was designed to repay the initial \$400,000. The check was dated the same day that Susie received the \$320,000 check from John. Appellant's expert accountant opined that Susie received a tax benefit in the form of avoiding a taxable relief of indebtedness by paying off the first loan with a subsequent gift.

Appellant also learned that John had written annual checks to Susie in the amount of \$9,500 between 1989 and 1997. Susie told appellant that Plourde, Sr., had advised the checks provided some tax benefit. Plourde, Sr., confirmed that the \$9,500 amount fell

below the \$10,000 gift limitation, meaning the amount did not have to be reported on John's tax returns.

The Pleadings and Trial.

In May 2006, appellant filed the operative first amended complaint against Susie, both individually and in her capacity as a trustee of the Susie Tracy Family Trust, alleging causes of action for conversion, breach of fiduciary duty, money had and received, constructive trust, preliminary and permanent injunction, and accounting and declaratory relief. Susie answered, generally denying the allegations and asserting multiple affirmative defenses.

Appellant elected to try only two causes of action: his breach of fiduciary duty claim went to the jury and his constructive trust claim went before the trial court. He sought recovery of the second \$400,000 transfer and personal property items from Louise's estate. John passed away one month before trial commenced in July 2007.

The jury heard three days of testimony. At the conclusion of the evidence, the trial court granted Susie's motion for nonsuit on the issue of punitive damages. It also granted Susie's motion for directed verdict on the issue of damages relating to the alleged breach of fiduciary duty in connection with the personal property from Louise's estate.

After deliberating for just over one day, the jury returned its special verdict form. It preliminarily rejected Susie's statute of limitations defense, finding that appellant proved neither he nor John earlier discovered facts that would have led a reasonable person to suspect Susie's alleged breach of fiduciary duty as to the \$320,000 transfer, the \$80,000 transfer or the distribution of personal property from Louise's estate. The jury further determined that a confidential relationship existed between Susie and John; Susie purported to act on John's behalf; Susie obtained a substantial advantage over John with respect to the \$320,000 transfer, the \$80,000 transfer and the distribution of personal property from Louise's estate; and appellant was entitled to recover \$1 for the \$320,000 transfer and \$1 for the \$80,000 transfer.

Following the verdict, appellant sought the imposition of a constructive trust over several items of personal property that he identified as belonging to Louise's estate and

then in Susie's possession. Susie opposed the request, asserting that the doctrine of laches barred the imposition of a constructive trust. One week after an August 1, 2007 hearing, the trial court issued a minute order ruling that appellant was "not entitled to a constructive trust for at least two reasons; one, the claim is barred by the doctrine of laches, and two, there is a complete failure of proof as to what the property is, how it is valued, how it should be allocated fairly, and how the Court could therefore make any fair apportionment thereof."

In connection with its application of the doctrine of laches, the trial court explained: "[T]here is simply no way, some 23 years after the fact, to determine what personal property was in the estate of Louise Tracy which was then to be divided between defendant and her deceased brother, plaintiff's father." The court further observed that all witnesses who could testify on the issue were deceased; "there was no inventory introduced into evidence and plaintiff himself did not establish the totality of the personal property nor assign any value to even one piece thereof"; and appellant's argument that the property could not have been provided to John earlier because he lived in an apartment was contradicted by evidence that the property now sought to be divided consisted of small items, including pictures, posters and an Academy Award.

Further, because appellant failed to identify the contents and value of the personal property at issue, the trial court added that it was "completely unable to determine whether what he [appellant] seeks is indeed 'half' the personal property, which is what his father apparently was entitled to inherit from Louise Tracy. The items plaintiff demands in terms of value may far exceed 'half,' even assuming that John Tracy did not already receive his half, which he claimed he had by signing a receipt for same 23 years ago." The trial court entered judgment on the legal and equitable claims in September 2007.

Posttrial Proceedings.

Appellant moved for a new trial and for judgment notwithstanding the verdict on the issue of damages. In both motions appellant asserted that the damages award was not supported by substantial evidence. In the motion for new trial, appellant additionally

claimed that the award was the result of jury misconduct in that the jury awarded only a token amount to avoid further deliberations and exhibited bias against appellant. In support of the motion, appellant submitted the declaration of Juror A.P., who had previously written a letter to the trial judge expressing what he considered troublesome aspects of the deliberations and verdict, and the declaration of Juror L.C.² According to Juror L.C., the jury became polarized on the issue of damages and “[t]here was very little attempt to determine the actual amount of damages that should be awarded. It was an all or nothing proposition. As to the first transfer, only \$320,000 or zero was being considered. Someone suggested a middle position of \$160,000 as a possibility, but it did not obtain a majority position.”

Susie opposed both motions. In opposition to the motion for judgment notwithstanding the verdict, she asserted that substantial evidence supported the damages award. According to Susie, the verdict form gave the jury discretion to award any amount, and the \$1 awards reflected a finding by the jury that \$320,000 and \$80,000 transfers were unfair to John but made as a gift. In opposition to the motion for new trial based on jury misconduct, she asserted that the declarations contained inadmissible evidence and, to the extent admissible, failed to establish that the damages award was reached by lot or chance, or was the result of impermissible bias. Concurrently with her opposition, she moved to strike portions of the declarations.

In an order dated September 19, 2007, the trial court denied appellant’s motions and, with one exception, granted Susie’s motion to strike in its entirety. With respect to the new trial motion, the trial court ruled that the damages were not inadequate as a matter of law or fact, and were supported by the evidence. It further found no evidence of bias or misconduct affecting the damages award. The trial court noted that it would

² The trial court subsequently granted Susie’s motion to strike portions of the juror declarations. Because appellant has not challenged these evidentiary rulings on appeal, we do not consider the evidence excluded by the trial court. (See *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1015.)

reach the same result even if it were to consider the objectionable portions of the juror declarations. With respect to the motion for judgment notwithstanding the verdict, the trial court found that the agreed-upon verdict form permitted the jurors discretion to determine the amount of damages and that “[t]he jury could have found based on the evidence before it that the transfers were gifts and that while these gifts were unfair given Susie Tracy’s position they did not damage the plaintiff in an appreciable manner, especially given the time that has passed, and the lack of any evidence that the monies at issue would have necessarily been used or spent in any particular way.”

Appellant appealed from the judgment as well as the denial of his posttrial motions.

In September 2007, appellant filed a memorandum of costs seeking recovery of \$13,999.45. Susie filed a motion to tax costs on the grounds that appellant recovered less than the jurisdictional limit of \$25,000 and less than her Code of Civil Procedure section 998 offer of \$1,000. Notwithstanding appellant’s opposition, the trial court granted the motion on the ground that judgment had previously awarded costs to Susie, to the exclusion of appellant, and on the ground that the judgment was less than the Code of Civil Procedure section 998 offer. But because Susie failed to meet her burden to delineate between preoffer and postoffer costs, the trial court further declined to award any costs to her. Appellant separately appealed from the order granting Susie’s motion to tax costs. We granted appellant’s motion to consolidate the two appeals.

DISCUSSION

Appellant challenges the judgment and subsequent orders on multiple grounds. He contends the trial court erroneously excluded evidence of John’s diaries, the damages award was not supported by substantial evidence, the jury engaged in misconduct in making its damages award, the trial court erred in declining to impose a constructive trust over certain items of personal property and the trial court erred in granting the motion to tax costs. Because substantial evidence did not support the trial court’s declining to impose a constructive trust, we reverse that aspect of the judgment. We also reverse the

order granting Susie's motion to tax costs. We find no basis to disturb the balance of the judgment and orders.

I. The Trial Court Properly Exercised Its Discretion in Excluding John's Diaries from Evidence.

Before trial began, Susie moved to exclude the admission of John's 1986, 1988 and 1989 diaries pursuant to Evidence Code section 352, asserting that any relevance the diaries might have was outweighed by the potential for an undue consumption of time and prejudice. Appellant, on the other hand, argued the diaries were admissible pursuant to Evidence Code section 1250 to show John's state of mind at the time of the \$320,000 and \$80,000 transactions with Susie and Moon. More specifically, he argued that John's failure to mention the transactions in his diaries, including the absence of his intent to make a gift, was relevant to show the transactions were intended as loans. At the hearing on the motion, Susie additionally objected to the admission of the diaries as hearsay. The trial court granted the motion to exclude the diaries on the ground that the absence of a diary entry could not serve as evidence when there was no showing that all diaries were produced and no basis to establish the probative nature of a diary omission.

We review the trial court's order excluding evidence for abuse of discretion. "[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion." [Citation.] "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) If the exclusion of evidence is proper on any theory of law applicable to the case, the exclusion must be affirmed regardless of the basis for the trial court's ruling. (*Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173.) “Moreover, even where evidence is improperly excluded, the error is not reversible unless “it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citation.]” [Citation.]” (*Tudor*

Ranches, Inc. v. State Comp. Ins. Fund, supra, at pp. 1431–1432; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

Appellant argues that the diaries fell within an exception to the hearsay rule, Evidence Code section 1251, because they tended to establish John’s state of mind. Pursuant to that provision, when a declarant is unavailable, evidence of a statement by that declarant concerning his or her state or mind is admissible if “[t]he evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.” (Evid. Code, § 1251, subd. (b).) But the admissibility of statements of an unavailable declarant’s previously existing state of mind under Evidence Code section 1251 is expressly subject to Evidence Code section 1252, which provides: “Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.”

Here, the trial court determined that evidence of the absence of a diary entry lacked trustworthiness. The trial court noted that only three years of John’s diaries had been produced, thus undermining appellant’s argument that the absence of an entry was significant because he could establish John wrote entries about all other events in his life. Indeed, after Susie’s counsel argued the absence of an entry had no meaning without production of every single diary, the trial court inquired of appellant’s counsel: “How do you establish under the Evidence Code that these diaries contain everything the guy ever did so that we can assume if something isn’t there, it didn’t happen?” Appellant’s counsel conceded there was no Evidence Code section on point. Given that concession, the trial court appears to have evaluated these circumstances in accordance with the framework of Evidence Code section 1272, which provides an exception to the hearsay rule for the absence of a business record when such a record would be made in the regular course of business and other circumstances demonstrate that the absence of the

record is a trustworthy indication the event did not occur.³ Because appellant failed both to produce the entire universe of John’s diaries and to establish that the absence of any mention of the gift to Susie was a reliable indication that he did not intend to make a gift, the trial court properly exercised its discretion in excluding the diaries.

Appellant cites *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 982–983, and *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 591–593, where the courts upheld the admission of diary entries of a plaintiff and a witness, respectively, to show their state of mind. The critical distinguishing feature of those cases is that they involved the admission of diary entries—not the absence thereof. Moreover, there was no evidence in either case to suggest that the diary entries lacked trustworthiness under Evidence Code section 1252. (See *West v. Bechtel Corp.*, *supra*, at pp. 982–983; *Rufo v. Simpson*, *supra*, at pp. 591–595.)

In any event, even if we were to conclude that the trial court abused its discretion in excluding the diaries from evidence, appellant suffered no prejudice as a result of the exclusion. Error in excluding evidence is a ground for reversing a judgment only if the error resulted in a miscarriage of justice, meaning that a different result would have been probable if the error had not occurred. (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480; see also Cal. Const., art. VI, § 13.) Appellant testified that John told him he believed the \$400,000 transaction was a loan. Evidence of the absence of any reference to a gift in John’s diaries was consistent with the evidence the jury received concerning John’s state of mind. (See *County of Riverside v. Loma Linda University* (1981) 118 Cal.App.3d 300, 321 [party suffered no prejudice from exclusion of

³ Evidence Code section 1272 provides: “Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if: [¶] (a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and [¶] (b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.”

deposition testimony where it was cumulative to other evidence admitted at trial].) Accordingly, the exclusion of John's diaries presents no basis for reversal of the judgment.

II. Substantial Evidence Supported the Jury's Damages Award and It Did Not Result from Jury Misconduct.

Appellant challenges the jury's \$2 damages award on the grounds that it was not supported by substantial evidence and was the result of jury misconduct, having been decided in order to avoid further deliberations and on the basis of a bias against appellant. We find no merit to either contention.

A. Substantial Evidence Supported the Jury's Verdict That the \$400,000 Gift did Not Result in Any Appreciable Damage to Appellant.

In its special verdict form, the jury found that Susie obtained "a substantial advantage at the expense of John" with regard to the \$320,000 and \$80,000 transfers, and that Susie did not meet her burden to show that the transfers were fair with respect to John, yet awarded \$1 in damages for each transfer.

We review the jury's award of damages for substantial evidence. "[W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" (*Da Silva v. Pacific King, Inc.* (1987) 195 Cal.App.3d 1, 10–11 [refusing to "disturb the jury's determination of damages"]; accord, *Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361 ["The power of an appellate court to review the trier of fact's determination of damages is severely circumscribed"]). To the extent that appellant's argument is premised on the denial of his motion for new trial asserting that damages were inadequate as a matter of law, we must independently review the record to determine whether there was prejudicial error. (Code Civ. Proc., § 657; *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872; *Ajaxo, Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 46–47.)

Though appellant proffered evidence that John told him he believed the \$320,000 and \$80,000 amounts provided to Susie and Moon were loans, the balance of the evidence demonstrated that the \$400,000 total amount was intended to be a gift. Susie testified that the amount was intended as a gift and that she thanked her brother profusely for it. Plourde, Sr., described in detail the circumstances surrounding John's decision to make a gift, noting that John had sold a large block of stock in newspaper company that left him with a significant amount of cash. In answer to John's question about how he could reduce his estate tax, Plourde, Sr., advised that he could give gifts below the \$600,000 lifetime gift tax threshold. Shortly thereafter, John met with Susie, Moon and his attorney, and indicated that he wanted to give a gift to Susie and Moon so that they could pay off the prior loan. In turn, Susie and Moon issued final payments for the loan, and John issued them the \$320,000 and \$80,000 checks as a gift. Plourde, Sr., prepared gift tax returns to reflect those amounts, and explained to John the tax implications of the gifts.

On the basis of this evidence, the jury was asked to decide whether Susie obtained an unfair advantage through this transaction. The jury was instructed that in order to establish a right to cancel a transaction, appellant had the burden of demonstrating that a confidential relationship existed between the parties to the transaction and that Susie caused John to enter into a transaction which gave her an advantage over John. The instructions defined an "advantage" as that "obtained by a person whenever that person's position is improved or he or she otherwise obtains a favorable opportunity or otherwise gains, benefits, or profits." Evidence that Susie and Moon received a \$400,000 gift enabling them to pay off a prior loan established that Susie obtained an "advantage."

The jury was further instructed that appellant was entitled to cancel a transaction providing Susie with an advantage, unless Susie could demonstrate that the transaction was fair and reasonable. In a related instruction, the jury heard that a gift between those in a confidential relationship is presumptively void when the recipient fails to demonstrate that his or her dealings were fair with respect to the principal. Consistent with these instructions, appellant's counsel argued in closing argument that Susie failed

to establish the gift was fair because “Susie got the \$400,000 as a gift tax-free,” meaning that she did not have to pay any tax for forgiveness of indebtedness.

But despite the jury instructions requiring cancellation of a gift that is found to be unfair, the jury was not asked to cancel the transaction. Rather, the jury was instructed only as to the remedy of damages. Specifically, the instructions provided: “If you decide that Joseph Tracy, as the trustee of his father’s trust, has proved his claim against Susie Tracy, you must also decide how much money will reasonably compensate the John Tracy Amended and Restated Family Trust for the harm. This compensation is called ‘damages.’” The jury was further instructed that the amount of damages should include an award for each item of harm caused by Susie’s conduct. Though the instructions provided that appellant claimed harm in the amount of \$320,000 and \$80,000 for each respective transfer, the special verdict form gave the jury complete discretion, asking “[w]hat is the amount of compensatory damages the plaintiff is entitled to recover concerning [each] transfer?” Appellant’s counsel argued that damages should be comprised of the amount of the \$320,000 and \$80,000 gifts plus interest.

Substantial evidence supported the jury’s nominal award. The evidence showed that Susie’s receipt of a gift from John—while not necessarily fair because of her position of confidence with him—did not cause any damage to John or his trust. Plourde, Sr., testified that John was very generous and it was not unusual for him to give gifts to family members. Appellant, himself, received several monetary gifts from John. Because the making of a gift was consistent with John’s intentions, the evidence supported the determination that neither John nor his trust suffered any damage by reason of the gift. Notably, appellant’s claim of unfairness was focused on the tax benefit Susie received as a result of the gift. Yet, on the basis of the evidence and instructions, the jury reasonably could have determined that while Susie received an unfair tax advantage by reason of the \$400,000 gift, appellant suffered no appreciable loss because John received a corresponding benefit of tax avoidance through the provision of the gift. (See, e.g., *Rast v. Fischer* (1951) 107 Cal.App.2d 129, 135 [award of nominal damages in the

amount of \$1 “justified ‘whe[n] a breach of duty has caused no appreciable detriment,’” citing Civ. Code, § 3360].)

Likewise, because the jury’s award was supported by the evidence and consistent with appellant’s argument to the jury, we cannot conclude that the award was inadequate as a matter of law. We find no basis to disturb the trial court’s ruling denying appellant’s motion for new trial on the ground of inadequate damages. The trial court reasoned that appellant failed to show the damages awarded were inadequate as a matter of law or fact. It noted that the jury could have found the transactions unfair given Susie’s relationship with John, but also found that there was no damage given the passage of time and the lack of evidence that John intended any other use for the monies. These circumstances stand in contrast to those in the case cited by appellant, *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720. There, the appellate court reversed the denial of a new trial motion on damages because the defendant conceded and the undisputed evidence established that the plaintiff was entitled to a credit for certain work performed pursuant to change orders. (*Id.* at p. 752.) Here, Susie contested owing any damages at all, and the evidence supported the amount ultimately awarded by the jury.

B. Appellant Failed to Demonstrate That the Damages Award Was the Result of Improper Deliberations or Bias.

Alternatively, appellant argues that the damages award should be reversed because it was the result of jury misconduct, as he asserted in his motion for new trial. Although we review the trial court’s grant of motion for new trial based on prejudicial juror misconduct for an abuse of discretion, we independently review as a mixed question of fact and law the trial court’s finding of no prejudice from the asserted misconduct. (*People v. Ault* (2004) 33 Cal.4th 1250, 1255; accord, *City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 872 [“In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial”].)

Code of Civil Procedure section 657, subdivision 2 provides for new trial on grounds of “[m]isconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.” Further, “when a juror conceals bias on voir dire, . . . the event is called juror misconduct.” (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) When a trial court is faced with a new trial motion alleging jury misconduct, it determines whether the declarations supporting the motion are admissible; decides whether the facts averred to establish misconduct; and, if misconduct is found, determines whether the moving party was prejudiced by the misconduct. (*Bell v. State of California* (1998) 63 Cal.App.4th 919, 932.)

Appellant asserts that he established prejudicial jury misconduct through the declarations of Jurors A.P. and L.C. In making its threshold determination, the trial court sustained multiple objections to those declarations made pursuant to Evidence Code section 1150,⁴ and thus considered only approximately three paragraphs from each declaration in connection with the motion. Because appellant has not challenged those evidentiary rulings on appeal, we, too, consider only the portions of the declarations that were not stricken. (E.g., *Artiglio v. Corning Inc.*, *supra*, 18 Cal.4th at p. 612; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 350–351.) We reject appellant’s contention raised in his reply brief that his opening brief adequately addressed the evidentiary rulings through the statement “Joseph has no objection with the trial court’s exclusion of those portions of the two juror declarations which actually involve the thought processes of the jurors.” (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785

⁴ Evidence Code section 1150, subdivision (a) provides: “[A]ny otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.”

[contentions on appeal are waived when there is a failure to support them with reasoned argument and citations to authority].)

According to the declarations, the jury quickly reached a verdict on liability and reached a decision to award one dollar on each claim after lunch the following day. Juror L.C. further declared: “Because of the value judgments being made about whether Joseph Tracy was hardworking or not, and his lifestyle, the jury became very polarized on the issue of damages. There was very little attempt to determine the actual amount of damages that should be awarded. It was an all or nothing proposition. As to the first transfer, only \$320,000 or zero was being considered. Someone suggested a middle position of \$160,000 as a possibility, but it did not obtain a majority position.”⁵

The trial court properly determined that the averments in Juror L.C.’s declaration failed to establish misconduct. Her statements that the jury was “polarized” and made “little attempt” to calculate damages are the type that are generally barred by Evidence Code section 1150. “[The] law distinguishes between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror or jurors which can be neither corroborated nor disproved. [Citation.] [¶] The only improper influences that may be proved under [Evidence Code section] 1150 to impeach a verdict therefore are those open to sight, hearing and the other senses and thus open to corroboration. [Citation.]” (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 974; accord, *People v. Hutchinson* (1969) 71 Cal.2d 342, 346–350.) The statements in Juror L.C.’s declaration are no different than those in *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1082–1083, where declarations set forth the inferences the jurors drew from the trial court’s statement that the jury was not entitled to certain information it requested during deliberations. The court found that “[t]hese matters had the effect of proving the mental or reasoning processes of said jurors and, as such, were not subject to

⁵ The admission of this paragraph appears to be the result of Susie’s inadvertent failure to object to it, as the trial court sustained her objection to a similar paragraph in Juror A.P.’s declaration.

corroboration or disproof.” (*Id.* at p. 1083; see also *Krouse v. Graham* (1977) 19 Cal.3d 59, 81 [“An assertion that a juror privately ‘considered’ a particular matter in arriving at his verdict, would seem to concern a juror’s mental processes, and declarations regarding them, accordingly, would be inadmissible under section 1150”]; *Continental Dairy Equip. Co. v. Lawrence* (1971) 17 Cal.App.3d 378, 385, 387 [declarations that jurors were confused about the evidence and “that several of the jurors wanted to get it over with and to go home since they were tired due to the length of the trial” held to prove “the mental processes or reasons and subjective considerations which influenced their verdict and did not constitute competent evidence to impeach the verdict”].)

Likewise, Juror L.C.’s statements that the jury became polarized on the issue of damages, in part, because of “value judgments” about appellant’s lifestyle failed to establish bias amounting to misconduct. To justify a new trial based on a juror’s concealment of bias on voir dire, the evidence must show that “at the outset of the trial the juror as a ‘demonstrable reality’ [citation] was, because of a general bias against the plaintiff [citation] irrevocably committed to vote against the plaintiff regardless of the facts that might emerge in the trial. [Citation.]” (*Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, 996.) This type of concealed bias was shown by the juror declarations in the two cases relied on by appellant. (See *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 510 [new trial warranted where jurors concealed bias against police officers, evidenced by jurors’ statements during deliberations that in their own experience the police were not to be trusted, always conceal and falsify evidence and “screw over” people]; *Tapia v. Barker* (1984) 160 Cal.App.3d 761, 764–766 [new trial warranted where juror concealed bias against Mexicans, evidenced by negative comments during deliberations about the plaintiff’s heritage that were not based on the evidence at trial].) In contrast, it is not misconduct for a juror to state where he or she stands on an issue once the case has been submitted to the jury. (See *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911–912.) Juror L.C.’s declaration offered no evidence that any of the jurors harbored a preexisting bias against appellant; rather, their comments were prompted by the evidence offered during trial. (See *Tillery v. Richland*, *supra*, 158

Cal.App.3d at pp. 975, 976 [absent context, jurors’ statement during deliberations that “‘he’ll blow the money in Las Vegas’” was not an indication of any preexisting bias against the plaintiff and may well have been stimulated by testimony and other evidence at trial].)

In sum, the trial court properly determined—on the basis of the admissible evidence submitted in connection with the motion for new trial—that there was no prejudicial misconduct affecting the jury’s verdict. The evidence failed to show either that the verdict was reached by chance or that any juror concealed a preexisting bias that affected the verdict.

III. Appellant Was Entitled to the Remedy of a Constructive Trust Over Certain Personal Property.

The jury found that a confidential relationship existed between John and Susie, that Susie purported to act on John’s behalf, that Susie obtained a substantial advantage at the expense of John with respect to the distribution of personal property from Louise’s estate and that Susie failed to meet her burden to show that it was fair with respect to John for her to retain all items from Louise’s estate. Given those findings, appellant sought the imposition of a constructive trust over 16 items held by Susie that had been a part of Louise’s estate. The trial court denied appellant’s request, ruling that the claim was barred by laches and appellant failed to establish an appropriate value and allocation of any personal property.

A “party attempting to establish the constructive trust must establish the claim by clear and convincing evidence. [Citation.]” (*Taylor v. Fields* (1986) 178 Cal.App.3d 653, 665.) On appeal, we review the trial court’s factual findings for substantial evidence (e.g., *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880–881), and we review the trial court’s selection of the constructive trust remedy for an abuse of discretion. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 878; accord, *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 894 [“propriety of granting equitable relief in a particular case by way of impressment of a constructive trust generally rests upon the sound discretion of the trial court exercised in accord with the

facts and circumstances of the case”]; *Hicks v. Clayton* (1977) 67 Cal.App.3d 251, 265 [same].) We review the trial court’s laches determination for substantial evidence. (*Womack v. San Francisco Community College Dist.* (2007) 147 Cal.App.4th 854, 858–859; *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1417.) Even applying these deferential standards of review, we find no support in the record or the law for the trial court’s declining to impose a constructive trust.

“A constructive trust is ‘[the] usual theory’ upon which a plaintiff recovers wrongfully acquired assets.” (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 134; see also *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990 [“A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner”].) “‘A constructive trust is not a true trust but an equitable *remedy* available to a plaintiff seeking recovery of specific property in a number of widely differing situations. The cause of action is not based on the establishment of a trust, but consists of the fraud, breach of fiduciary duty, or other act which entitles the plaintiff to some relief. That relief, in a proper case, may be to make the defendant a constructive trustee with a duty to transfer to the plaintiff.’ [Citation.]” (*Olson v. Toy* (1996) 46 Cal.App.4th 818, 823.)

“The principal circumstances where constructive trusts are imposed are set forth in Civil Code sections 2223 and 2224. Section 2223 provides that ‘[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.’ Section 2224 states that ‘[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.’ Under these statutes and the case law applying them, a constructive trust may only be imposed where the following three conditions are satisfied: (1) the existence of a *res* (property or some interest in property); (2) the *right* of a complaining party to that *res*; and (3) some *wrongful* acquisition or detention of the *res* by another party who is not entitled to it. [Citations.]” (*Communist*

Party v. 522 Valencia, Inc., supra, 35 Cal.App.4th at p. 990.) Essentially, “[a]ll that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the defendant would constitute unjust enrichment.” (*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116.)

Appellant established the requisite elements entitling him to a constructive trust. Appellant first established the existence of the property. Prior to his death, John prepared a list of approximately 24 items of personal property that he believed were a part of Louise’s estate. Appellant testified that he helped John prepare the list and further described each item in detail at trial. Susie, likewise, testified about the items; she confirmed that she had received them as part of Louise’s estate and that most of them remained in her possession. The items then in her possession included a dining room table and chairs, a model ship, polo trophies, a sofa and chairs, framed photographs and photo albums, framed Academy Award nominations, an Oscar, family bibles, a globe, a desk, Spencer’s diaries and paintings and drawings.

Appellant further established his right to that property. Susie testified that, as the executrix of Louise’s estate, she received all items of personal property in the estate. She further acknowledged the existence of a court order requiring her to distribute one-half of Louise’s assets, including her personal property, to John. She conceded that she did not distribute any personal property to John. She further conceded that even though John had signed a receipt at the time Louise’s estate was distributed indicating that he received one-half of the assets, he never received one-half of the personal property. Susie testified that John’s estate retained an undivided one-half interest in the personal property from Louise’s estate.

Finally, the jury’s verdict established Susie’s wrongful retention of the property. The jury determined that Susie obtained an unfair advantage over John with respect to her retention of all items of personal property from Louise’s estate. Susie is precluded from challenging that finding on appeal. “[I]t is the general rule that a respondent who has not appealed from the judgment may not urge error on appeal.” (*California State Employees’*

Assn. v. State Personnel Bd. (1986) 178 Cal.App.3d 372, 382, fn. 7; accord, *Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 985, fn. 3.)

Notwithstanding appellant's satisfaction of these elements, the trial court declined to impose a constructive trust for two reasons. First, it accepted Susie's argument that laches barred appellant's claim. It determined that because 23 years had passed since Louise's estate was distributed there was no way to determine what property was to be divided, given the death of certain key witnesses and the lack of specificity offered by other witnesses. The trial court further suggested that it found not credible appellant's statements that John had not asked for the property earlier because the items would not fit in his apartment, observing that much of the property consisted of small items such as pictures and posters.

The equitable defense of laches may bar relief to those who neglect their rights, where the neglect operates to the detriment of others. (*Bono v. Clark, supra*, 103 Cal.App.4th at pp. 1417–1418.) “The doctrine of laches bars a cause of action when the plaintiff unreasonably delays in asserting or diligently pursuing the cause and the plaintiff has acquiesced in the act about which the plaintiff complains, or the delay has prejudiced defendant. [Citations.]” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77; accord, *Pacific Hills Homeowners Assn. v. Prun* (2008) 160 Cal.App.4th 1557, 1564–1565.) Because it is an equitable defense, it is subject to certain limitations. (*Bono v. Clark, supra*, at p. 1418.) Significantly, “the doctrine ‘is not applied strictly between near relatives.’” (*Ibid.*, quoting *Berniker v. Berniker* (1947) 30 Cal.2d 439, 448–449; accord, *Isakoolian v. Issacoulion* (1966) 246 Cal.App.2d 225, 229–230.) “Delay alone ordinarily does not constitute laches, as lapse of time is separately embodied in statutes of limitation. [Citation.] What makes the delay unreasonable in the case of laches is that it results in prejudice. [Citation.]” (*Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29, 36.)

Given the relationship between Susie and John, and the circumstances under which Susie retained the personal property from Louise's estate, substantial evidence did not support the trial court's application of the doctrine of laches. (E.g., *Roddenberry v.*

Roddenberry (1996) 44 Cal.App.4th 634, 651 [“‘Substantial evidence is not synonymous with “any” evidence.’ Instead, it is “‘substantial’ proof of the essentials which the law requires”’”].) There was no evidence of a 23-year delay. As plainly stated in *Marshall v. Marshall* (1965) 232 Cal.App.2d 232, 252: “In an action to establish a constructive trust based on the violation of a parole promise continuing in nature, the doctrine of laches does not begin to operate until the trustee begins to act in hostility to such continuing obligation and such repudiation of the trust has been brought home to the beneficiary. [Citations.]” (See also *Martin v. Kehl* (1983) 145 Cal.App.3d 228, 241 [“the beneficiary of a constructive trust will not be barred by laches even though he knows of the circumstances giving rise to the trust where he has no reason to believe that the constructive trustee is holding the property adversely”]; *O’Brien v. O’Brien* (1942) 50 Cal.App.2d 658, 660 [same].) Until October 2003, when Susie responded to appellant’s inquiry asking for an inventory of the items, neither appellant nor John had reason to know that Susie did not intend to provide John with his share of the personal property. John believed that Susie was holding the items for him because he had no room for them. Consistent with that belief, Susie testified that she did not give the items to John because “he was living in the retirement hotel where there really was no room for him to bring anything and certainly no sofas and chairs and that kind of thing. He had a great deal there. We said it was bulging at the seams, I guess. He had the things he wanted around him and also just the fact he never—he never said a thing about wanting anything.” There was no evidence supporting the trial court’s conclusion that John did, in fact, have room for the property and it therefore could have been provided to him earlier.

Moreover, Susie failed to demonstrate any prejudice. “‘Delay is not a bar unless it works to the *disadvantage or prejudice* of other parties.’ [Citations.]” (*Bono v. Clark*, *supra*, 103 Cal.App.4th at p. 1419.) The trial court suggested that prejudice existed because both Louise’s estate attorney and John were deceased, and therefore could not testify as to the entirety of the estate. Death of a material witness may constitute prejudice. (*Id.* at p. 1420; *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 727.) Susie, however, failed to establish how the absence of those witnesses worked any

prejudice to her, as both she and appellant testified as to the existence of several specific items of personal property that were a part of Louise's estate. While the absence of evidence concerning the balance of the estate effectively worked to prejudice appellant, Susie failed to demonstrate how the unavailability of certain witnesses prejudiced her as to those items from Louise's estate that she maintained in her possession. Observing that "[p]rejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue," the court in *Bono v. Clark, supra*, at page 1420 declined to apply the doctrine of laches where the defendant failed to demonstrate how the death of two witnesses was prejudicial, particularly when other witnesses were able to testify about the contents of the estate at issue. There was a similar absence of prejudice here.

In addition to the unsupported finding of laches, the trial court also reasoned that appellant's failure to establish "what the property is, how it is valued, [and] how it should be allocated fairly" barred the imposition of a constructive trust. As discussed above, John's list, appellant's testimony and Susie's testimony provided ample evidence of what the property was. Further, appellant had no obligation to establish the property's value. As the court in *Martin v. Kehl, supra*, 145 Cal.App.3d at page 237, explained, "[t]he *only* conditions necessary to create a constructive trust are those stated in" Civil Code sections 2223 and 2224. (Italics added.) Neither statute requires evidence of value. Indeed "'a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled.' [Citations.]" (*Martin v. Kehl, supra*, at p. 238.) Likewise, appellant had no burden to establish a fair allocation of property. Rather, that was a determination for the trial court to make on the basis of the evidence before it. As explained in *Edwards-Town, Inc. v. Dimin* (1970) 9 Cal.App.3d 87, 94: "'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. . . . A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure

of relief.’”” Courts may, for example, declare that a defendant holds a one-half interest in the property at issue in constructive trust for the plaintiff. (E.g., *Halper v. Froula* (1983) 148 Cal.App.3d 1000, 1003.)

Accordingly, substantial evidence did not support the trial court’s refusal to impose a constructive trust over the limited items of personal property that were a part of Louise’s estate, enumerated on John’s list and identified by Susie as remaining in her possession. There was no basis for a finding of laches, and appellant had no burden either to identify the items’ value or specify their allocation. We must reverse the trial court’s order denying the imposition of a constructive trust and remand the matter to the trial court to “shape the measure of relief” on the basis of the evidence presented at trial. (*Edwards-Town, Inc. v. Dimin, supra*, 9 Cal.App.3d at p. 94.)

IV. The Trial Court Failed to Exercise Its Discretion in Granting Susie’s Motion to Tax Costs.

As initially drafted, the judgment awarded appellant actual damages in the amount of \$2 and costs in an amount to be determined. Because the amount of the judgment was below Susie’s \$1,000 offer to compromise submitted pursuant to Code of Civil Procedure section 998 (section 998), the judgment also awarded Susie her postoffer costs in an amount to be determined. Thereafter, both appellant and Susie filed cost memoranda, and both parties filed motions to tax costs. Susie argued that appellant was not entitled to costs because he recovered less than the court’s jurisdictional limit (see Code Civ. Proc., § 1033, subd. (a)) and because he recovered less than her section 998 offer to compromise.

In a November 28, 2007 minute order, the trial court—through a judge who had not presided at trial—ruled that appellant was not entitled to costs because the judgment did not provide him with an award of costs. The trial court also denied Susie an award of postoffer costs pursuant to section 998 because she failed to delineate between pre and postoffer costs in her cost memorandum. Only appellant appealed the denial of costs. Generally, “[w]e review the trial court’s denial of costs under Code of Civil Procedure section 1033, subdivision (a) for abuse of discretion.” (*Steele v. Jensen Instrument Co.*

(1997) 59 Cal.App.4th 326, 331.) Likewise, we review the trial court’s denial of costs under section 998 for an abuse of discretion. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152.)

But as recognized in *Fassberg Construction Co. v. Housing Authority of City of Los Angeles*, *supra*, 152 Cal.App.4th at pages 767 to 768: “The deferential abuse of discretion standard applies only if the trial court actually exercised its discretion. If the record clearly shows that the court failed to exercise its discretion, as here, we can neither defer to an exercise of discretion that never occurred nor substitute our discretion for that of the trial court. [Citation.]” Here, the trial court misread the judgment as awarding costs only to Susie. Therefore, it does not appear to have considered the arguments made by either party in connection with Susie’s motion to tax costs. We acknowledge the general rule that we review the trial court’s result, not its rationale, and must uphold the judgment if it is correct on any ground, regardless of the court’s stated reasons.

(*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *California Aviation, Inc. v. Leeds* (1991) 233 Cal.App.3d 724, 731.) But this rule is qualified by the principle that “we can affirm the ruling based on a discretionary ground that the court did not rely on only if the record compels the conclusion that any other decision would be an abuse of discretion and that no additional evidence relevant to the decision could be presented on remand. [Citation.]” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles*, *supra*, at p. 768.)

Here, it would not have been an abuse of discretion to award appellant costs as the prevailing party. Code of Civil Procedure section 1032, subdivision (a)(4) defines a “prevailing party” as one who receives a net monetary recovery. In turn, subdivision (b) states: “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (Code. Civ. Proc., § 1032, subd. (b).) Code of Civil Procedure section 1033 expressly provides otherwise, providing the trial court with the discretion to deny costs to a plaintiff who brings an action in the superior court and recovers a judgment that falls below the \$25,000 jurisdictional limit of, and thus could have been rendered in, a court of lesser

jurisdiction.⁶ (See *Steele v. Jensen Instrument Co*, *supra*, 59 Cal.App.4th at p. 331.) The purpose of Code of Civil Procedure section 1033, subdivision (a), however, is to encourage litigants to bring their actions in the appropriate forum. (*Steele v. Jensen Instrument Co*, *supra*, at p. 330; *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 701–702.) Notwithstanding appellant’s \$2 damages award, even Susie does not suggest that appellant’s claims would have properly been brought as a limited civil case.

Moreover, a complete denial of appellant’s costs was not warranted by reason of the section 998 offer. As explained in *Guerrero v. Rodan Termite Control, Inc.* (2008) 163 Cal.App.4th 1435, 1441: “Subdivision (c)(1) of section 998 distinguishes between preoffer and postoffer costs: ‘[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her *postoffer* costs and shall pay the defendant’s *costs from the time of the offer*.’” (Italics added.) By authorizing the shift only of costs incurred after rejection of the section 998 offer, a plaintiff obtaining any recovery—even though less than the section 998 offer—remains entitled to recover its preoffer costs, as provided by [Code of Civil Procedure] section 1032, while the defendant is entitled to recover postoffer costs.” Appellant’s cost memorandum established that he was seeking recovery of both preoffer and postoffer costs; only the latter would have been precluded by reason of the section 998 offer.

Accordingly, we reverse the trial court’s grant of Susie’s motion to tax costs and remand the matter with directions to the trial court to exercise its discretion under the

⁶ Code of Civil Procedure section 1033, subdivision (a) states: “Costs or any portion of claimed costs shall be as determined by the court in its discretion in a case other than a limited civil case in accordance with Section 1034 where the prevailing party recovers a judgment that could have been rendered in a limited civil case.” Since the 1998 unification of the municipal and superior courts, civil cases formerly within the jurisdiction of municipal courts, i.e., where the amount in controversy is less than \$25,000, are now classified as “limited civil cases.” (Code Civ. Proc., §§ 85–86.) All other actions are classified as “unlimited civil cases.” (Code Civ. Proc., § 88.)

applicable statutes. The trial court may also consider on remand that appellant is entitled to the remedy of a constructive trust.

DISPOSITION

To the extent the judgment reflects the jury verdict, it is affirmed. The trial court's denial of appellant's motion for a new trial is likewise affirmed. The trial court's orders denying the imposition of a constructive trust and granting Susie's motion to tax costs are reversed with directions to the trial court to fashion an appropriate equitable remedy on the basis of the evidence adduced at trial and to exercise its discretion in determining whether appellant is a prevailing party entitled to costs. Each side to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ